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IN THE

Supreme Court of the United States

October Term, 1969
No. 1020

GERSHON L. LEWIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

WALTER S. WEISS,
1900 Avenue of the Stars,
Suite 1800,
Los Angeles, Calif. 90067,
(213) 879-1222,
Counsel for Petitioner.

Of Counsel:
LONG & LEVIT,
1900 Avenue of the Stars,
Suite 1800,
Los Angeles, Calif. 90067,
(213) 879-1222.

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Petitioner feels compelled to correct the false impression which could be drawn from the Government's brief in opposition. Petitioner has not refused to turn over books and records to an independent grand jury—a grand jury which would insure the fair, impartial and apolitical consideration of the material submitted to it. However, this is not the prospect facing petitioner. Rather, the same Special Agents of the Internal Revenue Service and their superiors, sworn in as "agents of the grand jury", who at the outset of the investigation refused petitioner's counsel's request for a conference with their attorneys, are the individuals who will examine these records and report their conclusions to the grand jury. Thus, the grand jury will not see the

records which are produced in response to its subpoena but will only be presented with the conclusions of the "agents of the grand jury" based upon whatever sources these "agents" decide to utilize. For some unexplained reason the Government is taking extraordinary pains in this highly sensitive investigation of political contributions to insulate petitioner's books, and presumably his testimony, from the grand jury, insisting in advance and without request by the grand jury, that the books and records are too complicated for comprehension by the grand jury. As set forth in petitioner's Petition for Writ of Certiorari, this conduct constitutes both an improper usurpation of the grand jury's function and a violation of the grand jury's independence.

No attempt was made by the Government to refute any of the arguments presented at pages 15 through 17 of said Petition. Nor was any real effort made to distinguish the cases cited at pages 11 through 14 of the Petition other than the statement which appears at page 8 of the Government's brief that petitioner's cited authorities only prohibited the presence of "unauthorized persons in the grand jury room while the grand jury was in session."

Petitioner suggests that the distinction which the Government attempts to draw is meaningless since if it is improper to have an "agent of the grand jury" present in the grand jury room while the grand jury is receiving or reviewing evidence or testimony, it is equally improper for these "agents" to review and analyze out of the presence of the grand jury this same type of evidence and then submit a report to the grand jury based upon the "agents' " exclusive analysis of this material. In each situation the "long established policy of

secrecy, . . . older than our Nation itself",[1] and requirement of insulation of the grand jury from outside pressures are totally being ignored.

While it is undoubtedly true that changing times and circumstances may require that certain changes and expedient modifications be made in the administration of criminal justice, the Government, without the consent of Congress, should not be permitted to trifle with long-standing and well conceived rules and safeguards pertaining to the grand jury system. Whenever the Government attempts to do this, this Court must quickly and unequivocally intercede to prevent this threatened harm.

In at least one jurisdiction, specific legislation has been enacted to provide for the hiring of experts to assist the grand jury in the examination of complicated books and records. Section 926 of the California Penal Code provides in pertinent part:

> "If, in the judgment of the grand jury, the services of an expert are necessary for the purposes of Section 925 or Section 933.5 or both such sections, the grand jury may employ one, at an agreed compensation, to be first approved by the court. If, in the judgment of the grand jury, the services of assistants to such expert are required, the grand jury may employ such assistants, at a compensation to be agreed upon and approved by the court. . . ."

Not only has there been no similar expression by Congress authorizing the hiring of such experts, but as pointed out in the Petition, Rule 6(d) of the Federal Rules of Criminal Procedure expressly prohibits the presence of such experts while the grand jury is in session.

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[1] *Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395, 399 (1959).

The zeal with which the Government attempts to prevent the disclosure of grand jury proceedings is well known. Notwithstanding the practice in state courts where a transcript of grand jury proceedings is available to a defendant after he has been indicted,[2] the federal government regularly refuses to make available to a defendant the transcript of a prosecution witness' testimony before the grand jury. *Pittsburgh Plate Glass Co. v. U.S., supra.*

By seeking and obtaining a writ of certiorari in *United States v. Gifford-Hill-American Inc., et al.,* Oct.

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[2]*e.g., California,* Cal. Penal Code, Secs. 938, 938.1:
"938. Whenever criminal causes are being investigated before the grand jury, it shall appoint a competent stenographic reporter. He shall be sworn and shall report in shorthand the testimony given in such causes and shall transcribe the shorthand in all cases where an indictment is returned or accusation presented." "938.1. If an indictment has been found or accusation presented against a defendant, such stenographic reporter shall certify and file with the county clerk an original transcription of his shorthand notes and a copy thereof and as many additional copies as there are defendants, other than fictitious defendants, regardless of the number of charges or fictitious defendants included in the same investigation. The reporter shall complete such certification and filing within 10 days after the indictment has been found or the accusation presented unless the court for good cause makes an order extending the time. The time shall not be extended more than 20 days. The county clerk shall deliver the original of the transcript so filed with him to the district attorney immediately upon his receipt thereof, shall retain one copy for use only by judges in proceedings relating to the indictment or accusation, and shall deliver a copy of such transcript upon each such defendant or his attorney. If the copy of the testimony is not served as provided in this section the court shall on motion of the defendant continue the trial to such time as may be necessary to secure to the defendant receipt of a copy of such testimony 10 days before such trial . . . "; *Kentucky,* Ky. Rev. Stat. tit. B, ch. 1, §110 (App. 1959); *Iowa,* Iowa Code Ann. tit. 36, §772.4 (1950); *Minnesota,* Minn. Stat. Ann. pt. 5, §628.04 (1947); *Florida,* Fla. Stat. Ann. tit. 45, §905.27 (1951).

Term, 1969, No. 515, the Government attempted to have this Court continue in effect what amounts to a dual standard of discovery in federal criminal proceedings, *i.e.*, absolute discovery for the prosecution by the use of a controlled grand jury and its subpoena powers and absolute lack of discovery for a defendant seeking to prepare a defense.

With respect to the question of whether the action of the District Court was merely interlocutory and hence not reviewable on appeal, the Government's espousal of this position is totally inconsistent with its position in cases such as *Will v. United States,* 389 U.S. 90, and *United States v. Gifford-Hill-American, supra.* While litigants, including the Government, are unquestionably free to modify their positions before the courts in different cases, where the administration of criminal justice is involved the Government should not be permitted to use or discard basic principles of jurisprudence as exigencies of different cases are believed to dictate. If the Government truly believes that actions by a District Court concerning grand jury records or proceedings are beyond the immediate control or supervision of the appellate courts, it should not have sought review by this Court in cases such as *Will* or *Gifford-Hill-American.* If this is not its position, then the Government should not be heard in opposition on procedural grounds to petitions for certiorari such as the instant proceedings.

In *Donaldson, etc. v. United States, et al.,* Oct. Term 1969, No. 942, the government in its recently filed memorandum did not oppose the granting of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the issue of whether it is im-

proper for the Internal Revenue Service to utilize administrative summonses to obtain evidence of criminal violations. Since the instant proceedings arose as a result of the Internal Revenue Services' attempt to achieve the same result in the guise of a grand jury investigation, it is respectfully suggested that this matter be considered by this Court at the same time that *Donaldson* is considered, should a writ of certiorari be granted in that case.

Conclusion.

Petitioner respectfully urges that this Court grant the Petition for Writ of Certiorari so that this attempted abuse of the grand jury may be thwarted.

February 18, 1970.

Respectfully submitted,

WALTER S. WEISS,
Counsel for Petitioner.

Of Counsel:
LONG & LEVIT,